SUPREME COURT, U. S.

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No. 1126

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

CLARA L. WASHINGTON,

Petitioner,

v.

GOLDEN STATE MUTUAL LIFE INSURANCE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF TEXAS

PETITION

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FIDELITY PRINTING COMPANY, INC., HOUSTON

INDEX

	Page
Reference to Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provision and Statute Involved	3
Statement	4
Reasons for Granting the Writ	9
Conclusion	10
Appendix A —	
Opinions of Courts Below	1a

CITATIONS

Constitutional Provision

United States Constitution, Amendment XIV, Section 1	3

Statute

Texas Rules of Civil Procedure, Rule 166-A (c)	3, 4

Cases

Garcia v. Parr, 316 S.W. 2d 396	10
Gardner v. Martin, et al., 345 S.W. 2d 274	10
Holland v. Foley Brothers Dry Goods Company, 324 S.W. 2d 430 (Tex. Civ. App., writ ref.)	5
Pearl Assur. Co. v. Williams, 167 S.W. 2d 808 (Tex. Civ. App.)	3
Washington v. Golden State Mutual Life Insurance Co., 405 S.W. 2d 856 (Tex. Civ. App.)	1
Washington v. Golden State Mutual Life Insurance Co., 408 S.W. 2d 227	1

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GOLDEN STATE MUTUAL LIFE INSURANCE COMPANY,

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PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF TEXAS

PETITION

To The Honorable Mr. Chief Justice
and to The Honorable Mr. Justices
of The Supreme Court of the United States:

REFERENCE TO OPINIONS BELOW

The opinion of the Court of Civil Appeals, First Supreme Judicial District is reported in 405 S.W. 2d 856. The opinion of the Supreme Court of Texas is reported in 408 S.W. 2d 227.

A copy of both of such opinions are appended to this petition, being printed in Appendix A.

JURISDICTION

The date of the Judgment of The Supreme Court of Texas sought to be reviewed is November 9, 1966, and the time of its entry was shortly after 9:00 A.M., on said date. (For the Supreme Court of Texas announces these various orders from the bench beginning at 9:00 A.M.).

Petitioner's motion for rehearing of application for writ of error was overruled on December 7, 1966, and the time of its entry was shortly after 9:00 A.M., on said date.

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is 28 U.S.C., Section 1257 (3) and 2101 (c).

QUESTIONS PRESENTED

1. Does the due process of law clause, and the equal protection of the laws clause, of the Fourteenth Amendment to the Constitution of the United States protect a citizen of a State from a State judge rendering a motion for summary judgment in favor of the movant on only nine (9) days notice to the opposite party, when the rules of civil procedure of the State require ten (10) days notice of such motion for summary judgment to the opposite party, before a motion for summary judgment may be rendered?

2. Where a substantive right guaranteed to a citizen of a State under the Constitution of the United States is intertwined with one or several rules of civil procedure of a State, can an appellate court or the supreme court of such a state deny the substantive right guaranteed under the Constitution of the United States?

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The constitutional provision involved is Section 1, Article XIV of the Constitution of the United States:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of Life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The statute involved is Rule 166-A (c) of the Rules of Civil Procedure of the State of Texas, and is as follows:

Rule 166-A (c). Summary Judgment

(c) Motion and Proceedings thereon. The motion shall be served at least ten days before the time specified for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. (Vernon's Annotated Texas Rules of Civil Procedure, Page 477).

(The Rules of Civil Procedure are not merely procedural or technical, but have dignity of statutory provisions, *Pearl Assur. Co.* v. *Williams,* Civ. App. 1943, 167 S.W. 2d 808).

STATEMENT

Petitioner sued respondent to recover $3,333.00, the face amount on an insurance policy on the life of her husband, (Tr-2) plus 12% damages on the amount of such sum as the statutory penalty, (Tr-3). Prior to trial of the case on the merits, respondent filed a motion for summary judgment which was served on the attorney for the petitioner on January 22, 1966, by certified mail No. 349153. (Tr-36, 41). The motion for summary judgment was heard on January 31, 1966, (Tr-32) and the trial court granted the motion for summary judgment. (Tr-32). Only nine (9) days notice was given to the petitioner of this motion for summary judgment. (Rule 4, Texas Rules of Civil Procedure, Computation of Time). The Texas Rules of Civil Procedure requires ten (10) days notice to the opposite party of a motion for summary judgment. (T.R.C.P. 166-A(c)).

Petitioner filed a motion for new trial on March 5, 1966, (Tr-33, 34, 35, 36) and on March 30, 1966, presented to the Court Proponent's Motion for New Trial, (Tr-37) which motion was set down for hearing on the 11th day of April, 1966. (Tr-38)

That (Mr.) John Held, an attorney for the respondent was served with a subpoena duces tecum to bring with him to the hearing of the motion for new trial, Return Receipt Requested Card, for United States certified mail No. 349153, (Tr-39) which the attorney for the respondent did, and it was marked Def. Ex. (Tr-41)
#1

That on the 11th day of April, 1966, the hearing of the motion for new trial was had by the trial court and said motion for new trial was decided and determined on that date, and overruled. (Tr-42) And the Judge signed the

order overruling the motion for new trial on the 26th day of April, 1966. (Tr-42)

Petitioner filed her appeal bond on the 20th day of May, 1966. (Tr-43)

The Court of Civil Appeals, First Supreme Judicial District, held that the appeal bond was not filed in time as the 30 days allowed for the filing of the appeal bond was to be computed from the expiration of the forty-five day period, namely, April 19, 1966, and not from the date of the signing of the order by the trial judge, April 26, 1966, overruling the motion for new trial, and that the Court of Civil Appeals lacked jurisdiction.

This opinion of the Court of Civil Appeals, First Supreme Judicial District, held differently from an opinion of the Court of Civil Appeals, Sixth Supreme Judicial District, sitting at Texarkana, namely, *Holland* v. *Foley Brothers Dry Goods Company,* 324 S.W. 2d 430 (Tex. Civ. App. writ ref.) decided in 1959, wherein the Court of Civil Appeals, sitting at Texarkana, apparently held by a unanimous court that if the trial court decided or determined the motion for new trial on or before the 45th day after the filing of the motion for new trial that the date for the filing of the appeal bond would begin to run from the date of the signing of the order by the trial court, and not at the expiration of the forty-five day period.

The stage in the proceedings in the court of first instance at which, and the manner in which, the federal questions sought to be reviewed were raised, was in the Motion for New Trial, (Tr-34).

EIGHTH

The error of the Court in granting a summary judgment to the defendant wherein defendant has only given the plaintiff and opposite party nine days notice of the motion for summary judgment, for such nine days notice is not sufficient notice under Rule 166-A of the Texas Rules of Civil Procedure, and is therefore in violation of due process of law, and equal protection of the laws under Section 1, Article XIV of the Constitution of the United States.

The trial court overruled the motion for new trial in all things. (Tr-42)

On appeal to the Court of Civil Appeals, the federal questions sought to be reviewed were raised as follows:

In appellant's (this petitioner) Opposition to Motion to Dismiss Appeal, in paragraph VII, stating as follows:

That for the Court of Civil Appeals, First Supreme Judicial District, to place the interpretation urged by the counsel for the appellees in the time allowed for the filing of the appeal bond would be violative of the following:

(a) Rule 329b of the Texas Rules of Civil Procedure;

(b) Rule 356 of the Texas Rules of Civil Procedure;

(c) Rule 306a of the Texas Rules of Civil Procedure;

(d) Rule 1 of the Texas Rules of Civil Procedure;

(e) Section 19, Article I, of the Constitution of the State of Texas;

(f) Section 1, Article XIV, of the Constitution of the United States.

In the brief of appellant, by assignment of error, Eighth Point:

EIGHTH POINT OF ERROR (Restated)

In granting a summary judgment to the defendant wherein defendant has only given the plaintiff and opposite party nine days notice of the motion for summary judgment, for such is in violation of due process of law, and equal protection of the laws under Section 1, Article XIV of the Constitution of the United States.

The Court of Civil Appeals did not pass upon the federal questions sought to be reviewed.

In appellant's motion for rehearing before the Court of Civil Appeals, the federal questions sought to be reviewed were raised by assignment of error, third assignment of error:

THIRD ASSIGNMENT OF ERROR

The Court of Civil Appeals erred in interpreting Rule 329b, Rule 356, and Rule 306a of the Texas Rules of Civil Procedure in the manner that it has for such interpretation is violative of Section 19, Article I, of the Constitution of Texas, and is also violative of Section 1, Article XIV of the Constitution of the United States.

Appellant's motion for rehearing was overruled by the Court of Civil Appeals.

In petitioner's application for writ of error to the Supreme Court of Texas, the federal questions sought to be reviewed were raised by points of error, as follows:

THIRD POINT

The error of the Court of Civil Appeals in sustaining the error of the trial court in granting a summary judgment on only nine (9) days notice in fundamental error and is prejudicial error.

FOURTH POINT

The Court of Civil Appeals erred in not considering the Brief of the Appellant filed in the case, which was based on the error of the Court of Civil Appeals in interpreting Rule 329b, Rule 356, and Rule 306a, T.R.C.P., in the manner that it has, for such interpretation is violative of Section 19, Article I, of the Constitution of the State of Texas, and such interpretation is also violative of Section I, Article XIV of the Constitution of the United States.

The Supreme Court of Texas did not mention the Third Point of Error in its opinion. The Supreme Court of Texas apparently did not consider the brief of the appellant filed in the Court of Civil Appeals, but did approve the opinion and holding of the Court of Civil Appeals with respect to the construction placed upon Rules 329b, 356, and 306a of the T.R.C.P.

In the petitioner's motion for rehearing, the federal questions sought to be reviewed were raised by the following:

Grounds relied upon for the rehearing:

I.

This Honorable Court erred in not granting the Application for Writ of Error, and in not reversing and remanding this cause for a new trial, because the trial court in granting a summary judgment to the defendant and respondent on only nine (9) days notice to the plaintiff and petitioner of such motion for summary judgment violated Rule 166-A, T.R.C.P., and thereby this supposed judgment of the trial court is a void judgment.

III.

This Honorable Court erred in not granting the Application for Writ of Error, and in not reversing and remanding

the case to the trial court for a new trial because of prejudicial error of the trial court in granting a summary judgment to the defendant and respondent on only nine (9) days notice to the plaintiff and petitioner, and the error resulted in prejudice to the plaintiff and petitioner, and the error caused an improper judgment.

REASONS FOR GRANTING THE WRIT

A state court has granted a motion for summary judgment against the petitioner not in accordance with rules of civil procedure of the State of Texas, in that the rules of civil procedure require ten (10) days notice of such motion and petitioner only had nine (9) days notice of such motion.

That the appellate courts of the State of Texas have upheld the granting of a motion for summary judgment on only nine (9) days notice of such motion to the petitioner, when the rules of civil procedure of the State of Texas require ten (10) days notice of such motion.

That a state court has decided a federal question of substance, either not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court.

That the state courts of Texas have deprived the petitioner, a citizen of the United States and of the State of Texas, of due process of law, and the equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States. And the deprivation of these substantive rights have been accomplished by the intertwining of a rule of civil procedure of the State of Texas, with a substantive right guaranteed by the Constitution of the United States. And Rule 1, of the Texas Rules of Civil Procedure states: "The proper objectives of rules of civil procedure is (are) to obtain a just, fair, equitable and im-

partial adjudication of the rights of litigants under established principles of substantive law. To the end that this objective may be attained with as great expedition and dispatch and at the least expense both to the litigants and to the state as may be practicable, these rules shall be given a liberal construction.

In order for a moving party to be granted a summary judgment, all of the requirements prerequisite to obtaining same must be strictly complied with. *Garcia* v. *Parr,* 316 S.W. 2d 396; *Gardner* v. *Martin, et al.,* 345 S.W. 2d 274. And one of the requirements under the Texas Rules of Civil Procedure is that the opposite party must be given ten (10) days notice; nine (9) days notice is not sufficient.

CONCLUSION

For the foregoing reasons, petitioner prays that the Supreme Court of the United States grant this petition for a Writ of Certiorari, and petitioner further prays for costs of court in all state courts and in the Supreme Court of the United States.

Respectfully submitted,

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Appeal dismissed w.o.j., Chief Justice Bell not sitting, and opinion filed July 7, 1966.

APPENDIX A

No. 14911

CLARA L. WASHINGTON,

Appellant,

v.

GOLDEN STATE MUTUAL LIFE INSURANCE COMPANY,

Appellee.

APPEAL FROM DISTRICT COURT OF HARRIS COUNTY

The question presented is whether the time for the filing of an appeal bond runs from the date of the signing of an order overruling a motion for new trial where the motion was presented within thirty days of its filing and the ruling of the court was announced, but the order was not signed by the court until after the expiration of forty-five days.

In this case the judgment was signed February 24, 1966. A motion for new trial was filed on March 5, 1966. The order overruling the motion for new trial recites that it came on to be heard on April 11, 1966 and that it was signed April 26, 1966. The appeal bond was filed on May 20, 1966.

Rule 329-b, T.R.C.P., provides that all motions for new trial "must be determined within not exceeding forty-five days after the original . . . motion is filed, unless by written agreement of the parties in the case, the decision of the motion is postponed to a later date." No written agreement

of the parties postponing the decision appears in the transcript. The forty-five day period expired April 19, 1966.

Rule 356, T.R.C.P., requires bonds for costs on appeal to be filed within thirty days after the date of judgment or order overruling motion for new trial. Compliance with this rule has been held to be mandatory and jurisdictional to an appeal. The time limits prescribed cannot be dispensed with or enlarged by this Court for any reason. *Glidden Co.* v. *Aetna Casualty & Surety Co.*, 1956, 155 Tex. 591, 291 S.W. 2d 315; *Neuhoff Bros. Packers* v. *Acosta*, Tex. Civ. App. 1959, 319 S.W. 2d 416, aff'd 160 Tex. 124, 327 S.W. 2d 434.

Where no order overruling a motion for new trial is signed by the trial court, the motion is overruled by operation of law after forty-five days and the period within which the appeal bond must be filed begins. *Lucchese* v. *Specia*, Tex. Civ. App. 1955, 281 S.W. 2d 725, error ref.; *Texas Employers Ins. Ass'n* v. *Martin*, 1961, 162 Tex. 376, 347 S.W. 2d 916.

The judgment of the trial court overruling the motion for new trial was rendered on the day it was signed. Rule 306a, T.R.C.P.; Ex Parte Godeke, 1962, 163 Tex. 387, 355 S.W. 2d 701.

Since the order overruling the motion for new trial was rendered after the expiration of forty-five days from the date it was filed, it was a nullity since the motion had been previously overruled by operation of law. *Lucchese* v. *Specia, supra; Martinez* v. *Stephens*, Tex. Civ. App., 1952, 246 S.W. 2d 707.

The period within which the appeal bond had to be filed to confer jurisdiction on this Court, therefore, began on April 19, 1966, the day the motion for new trial was over-

ruled by operation of law. The last day for filing was May 19, 1966. The cost bond was filed on May 20, 1966. This Court acquired no jurisdiction of the case, and the appeal is ordered dismissed, Chief Justice Bell not sitting.

/s/ TOM F. COLEMAN
Associate Justice

Judgment rendered and opinion filed July 7, 1966.

IN THE SUPREME COURT OF TEXAS

No. A-11726

CLARA L. WASHINGTON,

Petitioner,

v.

GOLDEN STATE MUTUAL LIFE INSURANCE COMPANY,

Respondent.

FROM HARRIS COUNTY FIRST DISTRICT

ON APPLICATION FOR WRIT OF ERROR

PER CURIAM

The Court of Civil Appeals has held that the appellant's motion for new trial was overruled by operation of law on April 19, 1966. It dismissed the appeal because the appeal bond was not filed within thirty days after that date. 405 S.W. 2d 856. In the course of its opinion, the intermediate court stated: "The judgment of the trial court overruling the motion for new trial was rendered on the day it was signed." As we interpret this statement, it means that for the purpose of determining the time within which the various steps of the appeal must be taken, the order is deemed to have been rendered on the day it was signed. See Rule 306a, Texas Rules of Civil Procedure. On the basis of that construction, we approve the opinion and the holding of the Court of Civil Appeals, and the application for writ of error is Refused.

Associate Justice Smith not sitting.

Opinion delivered November 9, 1966

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IN THE

Supreme Court of the United States

October Term 1966

NO. 1126

CLARA L. WASHINGTON, *Petitioner*

v.

GOLDEN STATE MUTUAL LIFE INSURANCE COMPANY, *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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INDEX

	Page
Opinions Below	1
Jurisdiction	1
Question Presented	2
Statement	2
Reasons for Not Granting the Writ	3
Conclusion	6

CITATIONS

CASES	Page
Beck v. Washington, 369 U.S. 541, 549-53 (1962)	5
City of Deer Park v. State, 275 S.W.2d 77, 84 (Tex. 1955)	5
East Texas Motor Freight Lines v. Loftis, 223 S.W. 613 (Tex. 1949)	5
Equitable Life Assurance Society v. Brown, 187 U.S. 308 (1902)	4
Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945)	5
London Terrace, Inc. v. McAlister, 180 S.W.2d 619, 622 (Tex. 1944)	5
McCoy v. Shaw, 277 U.S. 302, 303 (1928)	6
Moore v. Dilworth, 179 S.W.2d 940 (Tex. 1944)	5
Murdock v. Memphis, 87 U.S. (20 Wall.) 590 (1875)	6
Scripto, Inc. v. Carson, 362 U.S. 207, 210 (1960)	6
Tips v. Security Life & Acc. Co., 191 S.W.2d 470, 472 (Tex. 1945)	5
UNITED STATES STATUTES	
28 U.S.C. 1257(3)	1
VERNON'S ANNOTATED TEXAS RULES OF CIVIL PROCEDURE	
Rule 458	5
Rule 476	5
MISCELLANEOUS	
Calvert, Some Problems of Supreme Court Review, 21 Tex. B.J. 75, 76 nn. 13, 15 (1958) and accompanying text	5

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GOLDEN STATE MUTUAL LIFE INSURANCE COMPANY, *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

OPINIONS BELOW

The opinion of the Texas Court of Civil Appeals (App. A of Petition) is reported at 405 S.W.2d 856. The opinion of the Supreme Court of Texas (App. A of Petition) is reported at 408 S.W.2d 227.

JURISDICTION

If this Court has jurisdiction to review the judgment of the Supreme Court of Texas it is only under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Did the trial court deny petitioner due process and equal protection of the laws by proceeding with the hearing on respondent's motion for summary judgment when counsel for both parties appeared and argued the merits without making any objection to holding the hearing?

STATEMENT

This is a suit on an insurance policy in which respondent moved for summary judgment. On January 31, 1966, attorneys for both petitioner and respondent appeared before the trial court (Tr. 32)* for a hearing on respondent's motion. The trial court heard evidence in the form of affidavits (Tr. 32) and argument of counsel on the merits and announced that it would grant the motion. Up to this time petitioner had not raised any objection to the court's proceeding with the hearing. However, later the same day petitioner filed a multi-headed motion (Tr. 30) in which she claimed (1) that the court should not have proceeded with the hearing on the respondent's motion for summary judgment because petitioner had not had the ten days notice of hearing provided for by the Texas Rules of Civil Procedure and (2) that summary judgment was improper as a matter of substantive law. On February 24, 1966, judgment that the petitioner take nothing by reason of her suit against respondent was signed and entered (Tr. 32) and petitioner then attempted to perfect an appeal to the Court of Civil Appeals for the First Supreme Judicial District of Texas.

Respondent moved the Court of Civil Appeals to dismiss the appeal for want of jurisdiction because of late filing

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*All references are to the Transcript of Record prepared by Hon. R. J. Lindley, District Clerk, Harris County, Texas.

of petitioner's appeal bond. On July 7, 1966, the Court of Civil Appeals filed a written opinion holding that it had acquired no jurisdiction because of late filing of petitioner's appeal bond and ordering the appeal dismissed for lack of jurisdiction. (App. A of Petition)

Petitioner then applied to the Supreme Court of Texas for a writ of error and on November 9, 1966, that court filed a written opinion approving the opinion and the holding of the Court of Civil Appeals and refusing the application for writ of error. Under Texas law this amounted to an affirmance of the action of the Court of Civil Appeals in dismissing the appeal for lack of jurisdiction. The merits of the appeal again were not reached. (App. A of Petition)

On December 7, 1966, petitioner's motion for rehearing was overruled by the Supreme Court of Texas and exactly ninety days later on March 7, 1967, the petition for writ of certiorari was filed in this Court.

REASONS FOR NOT GRANTING THE WRIT

1. The case presents no substantial federal question. Petitioner claims that although her attorney participated in the hearing on respondent's motion for summary judgment without making any objection to the court's proceeding, the court denied her due process and equal protection of the laws by proceeding when there was a claimed problem of notice not raised by petitioner until after the hearing was concluded. She further claims that the due process and equal protection clauses of the Fourteenth Amendment somehow compel the appellate courts of Texas to correct this claimed error on the part of the trial judge despite the fact that the Texas appellate courts could acquire no

jurisdiction of her appeal from the district court judgment because of the late filing of her appeal bond. In other words petitioner wants this Court to correct a claimed error of a Texas trial court which the Texas appellate courts had no jurisdiction to correct. This is a classic case of a "federal question" so absolutely devoid of merit as to be frivolous. Equitable Life Assurance Society v. Brown, 187 U.S. 308 (1902).

Petitioner also failed to raise the question sought to be reviewed in a proper and timely manner in the state courts. Petitioner's due process and equal protection claim in connection with the hearing was not made at that hearing nor was it made in the written motion filed by petitioner on the day of the hearing. (Tr. 30) Petitioner only got around to asserting the constitutional claim in her motion for new trial (Tr. 33, Petition 6) after judgment had been entered in favor of respondent. When respondent moved to dismiss petitioner's appeal in the Court of Civil Appeals petitioner countered with a paper called Opposition to Motion to Dismiss Appeal (Petition 6) which claimed that repondent's construction of the Texas requirements for the perfection of appellate jurisdiction, if accepted by the appellate court, would be violative of the Fourteenth Amendment. No claim was made in that paper that the trial court's action in proceeding with the hearing raised any federal constitutional problem, although this claim was made in a brief filed by appellant on July 18, 1966, some eleven days after the Court of Civil Appeals dismissed the case for want of jurisdiction. (Br. App. 3, Petition 7) No constitutional claim concerning the trial court's action in proceeding with the hearing was made in petitioner's motion for rehearing in the Court of Civil Appeals or in petitioner's application for writ of error in the Supreme

Court of Texas.[1] Petitioner's failure to raise the constitutional claim concerning the trial court's action in proceeding with the hearing by assignment of error in her motion for rehearing in the Court of Civil Appeals[2] and by point of error in her application for writ of error in the Supreme Court of Texas[3] constituted a waiver of this claim under Texas law. Because petitioner has failed to preserve the claim in accordance with Texas practice, review in this Court is precluded. Beck v. Washington, 369 U.S. 541, 549-53 (1962).

2. The judgment of the Supreme Court of Texas rests on adequate and independent state grounds within the meaning of this Court's decision in Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945). Petitioner concedes (Petition 7) that the Texas Court of Civil Appeals did not reach the federal question sought to be reviewed and of course the Supreme Court of Texas did not do so. (App. A of Petition) Petitioner does not attack the Texas procedural rules requiring certain appellate steps to be perfected within prescribed time limitations nor does she contend that the Texas courts have failed to uniformly apply these

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1. Petitioner's only constitutional claim in her motion for rehearing in the Court of Civil Appeals and in her application for writ of error in the Supreme Court of Texas consisted of her naked allegation that the interpretation of the Texas Rules governing appellate steps somehow violated the Fourteenth Amendment. (Motion for Rehearing 2, 5; Application for Writ of Error 2, 6, 7; Petition 7, 8).

2. Tex. R. Civ. P. 458; East Texas Motor Freight Lines v. Loftis, 223 S.W. 613 (Tex. 1949); Moore v. Dilworth, 179 S.W.2d 940 (Tex. 1944); Calvert, **Some Problems of Supreme Court Review**, 21 Tex. B.J. 75, 76 nn. 13, 15 (1958) and accompanying text.

3. Tex. R. Civ. P. 476; City of Deer Park v. State, 275 S.W.2d 77, 84 (Tex. 1955); Tips v. Security Life & Acc. Co., 191 S.W.2d 470, 472 (Tex. 1945); London Terrace, Inc. v. McAlister, 180 S.W.2d 619, 622 (Tex. 1944); Calvert, **supra**, at 76 n. 16 and accompanying text.

rules to all Texas litigants. All petitioner asks is that this Court review the judgment of the Supreme Court of Texas on a question of state law. It is well settled that state courts speak with final authority on state law questions, *e.g.*, Scripto, Inc. v. Carson, 362 U.S. 207, 210 (1960); Murdock v. Memphis, 87 U.S. (20 Wall.) 590 (1875), and that there can be no review if the state court has decided the case exclusively on some ground of state law and has never reached a federal question present in the case. McCoy v. Shaw, 277 U.S. 302, 303 (1928).

CONCLUSION

For these reasons the petition for writ of certiorari should not be granted.

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John C. Held
Perry O. Barber, Jr.
Counsel for Respondent

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CLARA L. WASHINGTON,
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Respondent.

REPLY BRIEF

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FIDELITY PRINTING COMPANY, INC., HOUSTON

IN THE

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GOLDEN STATE MUTUAL LIFE INSURANCE COMPANY,

Respondent.

REPLY BRIEF

To The Honorable Mr. Chief Justice
and to The Honorable Mr. Justices
of The Supreme Court of the United States:

STATEMENT

That neither the petitioner nor counsel for petitioner has ever approved of the recitations in the judgment either as to form or substance, rendered in behalf of the respondent on respondent's motion for summary judgment, which is evidenced by the fact that such judgment was never signed by counsel for petitioner. (Tr-32) That neither petitioner, nor her counsel has waived any right to which petitioner is entitled. (Tr-36).

That petitioner, prior to the 10th day of notice to her of the hearing of the motion for summary judgment, filed an affidavit opposing such motion for summary judgment,

which is in accord with the provisions of rule 166-A, Texas Rules of Civil Procedure. (Tr-26, 27)

REASONS FOR GRANTING THE WRIT

1. In Tobin v. Garcia and Parr, 316 S.W. 2d 396 (1958) the Supreme Court of Texas held that "The right to summary judgment was unknown to the common law and exists only by virtue of rule providing therefor, and in order to be entitled to benefits of such rule, all of its terms must be complied with. Rules of Civil Procedure, rule 166-A."

And in Gardner v. Martin, et al, 345 S.W. 2d 274, (1961), the Supreme Court of Texas held: "Summary judgment is possible only by virtue of rule of court, and to entitle party thereto, provisions of the rule must be strictly complied with. Rules of Civil Procedure, rule 166-A."

That the trial court granted the motion for summary judgment to respondent against petitioner, when petitioner had only 9 days notice of such motion for summary judgment. (Tr-33, 34, 35, 36, 41). That under rule 166-A, petitioner was entitled to 10 days notice of such motion for summary judgment. That therefore the granting by the trial court of a summary judgment for respondent was arbitrary, and deprived petitioner of due process of law and equal protection of the laws under the 14th Amendment to the Constitution of the United States.

2. Under rule 374, Texas Rules of Civil Procedure, the assignments of error on appeal or writ of error shall be set out and raised in the motion for new trial. Petitioner set out her Federal claim in her motion for new trial, (Tr-34), and said motion for new trial was presented to and heard by the trial court. Too, the trial court could not under rules of civil procedure of Texas have a hearing on the motion for summary judgment until after 10 days notice of such motion to the opposite party.

Petitioner raised the Federal questions sought to be reviewed in the Court of Civil Appeals by Eighth Point of Error, in the brief of appellant which brief was filed within the time prescribed by rule 414, Texas Rules of Civil Procedure. Under rule 415, the appeal could be dismissed for failure of appellant to file her brief within the time prescribed.

At the time that the appellant filed the brief of appellant in the Court of Civil Appeals, it was not known whether the Court of Civil Appeals would reverse its ruling on rehearing or whether the Supreme Court of Texas would reverse the Court of Civil Appeals. For the Supreme Court of Texas could have adhered to the rule laid down in *Holland* v. *Foley Brothers Dry Goods Company,* 324 S.W. 2d 430 (Tex. Civ. App. writ ref.); (See page 5 of Petition for a Writ of Certiorari) Under Texas law, the refusing of the application for writ of error amounts to an affirmance by the Supreme Court of Texas of the opinion of the Court of Civil Appeals.

Under the authority of the Holland case, it was concluded that the last date for the filing of the appeal bond would be May 26, 1966. The appeal bond was filed on May 20, 1966. (Tr-43).

And also by rule 329b, paragraph 4, since the motion for new trial was presented to the court within 30 days and was determined by the court prior to the 45th day, it was concluded that the motion for new trial was not overruled by operation of law. (See pages 3 and 4, of Petitioner's Motion for Rehearing).

Under rule 469, Texas rules of civil procedure, in an application for writ of error to the Supreme Court of Texas, the points of error relied upon shall be stated in short form and be germane to some assignment of error

in the motion for new trial in the trial court, or otherwise saved in the statement of points as authorized by the rules, and likewise assigned as error in the motion for rehearing in the court of civil appeals.

In the points and points of error as set out in the appellate courts of Texas, in this case, such points were germane to some assignment of error in the motion for new trial in the trial court, and germane to the Federal questions sought to be reviewed and which were raised in the appellate courts of Texas.

3. In addition to the above, courts of civil appeals have authority and duty to consider fundamental errors apparent upon the face of the record though not assigned. *Murray* v. *Briscoe,* 209 S.W. 2d 976. When the record affirmatively and conclusively shows that the court rendering the judgment was without jurisdiction of the subject matter, the error will be regarded as fundamental. Thus, even though the error asserted to be fundamental is not called to the attention of the trial court, and not assigned as error on appeal, the appellate courts are under the duty to consider and determine such error whether raised by the litigants or by the court on its own motion. In *Ramsey* v. *Dunlop,* 205 S.W. 2d 979, the supreme court of Texas held: "Appellate courts may consider fundamental errors though they are not assigned."

For the state trial court to grant a motion for summary judgment to the movant on only nine days notice to the opposite party when the rule of civil procedure requires 10 days notice was fundamental error, for the motion for summary judgment was not ripe for hearing, and the state trial court would not have jurisdiction of the subject matter until after 10 days notice to the petitioner of the motion for summary judgment.

4. The assertion of Federal rights when plainly and reasonably made is not to be defeated under the name of local practice. *Davis, Director General of Railroads* v. *Wechsler,* 263 U.S. 22, 24.

Even though the claimed constitutional protection be denied on non-Federal grounds, it is within the province of the Supreme Court of the United States to inquire whether the decision of the state court rests upon a fair or substantial basis. If insubstantial, constitutional obligations are not to be thus avoided. *Lawrence* v. *State Tax Commission,* 286 U.S. 276, 282.

It is within the province of the Supreme Court of the United States to inquire not only whether the Federal right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward nonfederal grounds of decision that were without fair or substantial support. *Ward et al* v. *Board of County Com'rs of Love County, Okl.,* 253 U.S. 17, 40 Sup. Ct. 419; *Postal Telegraph Cable Co.* v. *City of Newport, Ky.,* 247 U.S. 464, 38 Sup. Ct. 566.

CONCLUSION

For the reasons above and for the reasons stated in Petition for a Writ of Certiorari to the Supreme Court of Texas, petitioner prays that the Supreme Court of the United States grant this petition for a Writ of Certiorari, and for other relief as prayed for in her petition for a Writ of Certiorari.

Respectfully submitted,

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SUPREME COURT, U. S.

FILED

MAY 11 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1126

CLARA L. WASHINGTON,
Petitioner,

v.

GOLDEN STATE MUTUAL LIFE INSURANCE COMPANY,
Respondent.

PETITION FOR REHEARING

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FIDELITY PRINTING COMPANY, INC., HOUSTON

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OCTOBER TERM, 1966

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CLARA L. WASHINGTON,
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GOLDEN STATE MUTUAL LIFE INSURANCE COMPANY,
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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

To The Honorable Mr. Chief Justice and to the Honorable Mr. Justices of the Supreme Court of the United States:

Petitioner prays that this Court grant rehearing of its order of April 17, 1967, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Supreme Court of Texas in the above captioned case as prayed for in the petition docketed March 7, 1967, herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

1. In *Tobin* v. *Garcia and Parr,* 316 S.W. 2d 396 (1958) the Supreme Court of Texas held that "The right to summary judgment was unknown to the common law and exists

only by virtue of rule providing therefor, and in order to be entitled to benefits of such rule, all of its terms must be complied with. Rules of Civil Procedure, rule 166-A".

And in *Gardner* v. *Martin, et al,* 345 S.W. 2d 274, (1961), the Supreme Court of Texas held: "Summary judgment is possible only by virtue of rule of court, and to entitle party thereto, provisions of the rule must be strictly complied with. Rules of Civil Procedure, rule 166-A".

Therefore by the decisions of the Supreme Court of Texas, the granting by the trial court of the motion for summary judgment to respondent against petitioner, when the petitioner had only 9 days notice of such motion for summary judgment, (Tr 33, 34, 35, 36, 41) was arbitrary, and deprived petitioner of property without due process of law and has denied to petitioner the equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States, for under rule 166-A, petitioner was entitled to 10 days notice of such motion for summary judgment, and the rule must be strictly complied with, for a party to be entitled thereto.

That the violation of a right guaranteed by the Constitution of the United States, to a citizen of the United States, by a State, through a State official, presents a substantial federal question.

2. For the state trial court to grant a motion for summary judgment to the movant on only 9 days notice to the opposite party when the rule of civil procedure requires 10 days notice was fundamental error, for the motion for summary judgment was not ripe for hearing, and the state trial court did not have jurisdiction of the subject matter and would not have jurisdiction of the subject matter until after 10 days notice to the petitioner of the motion for summary judgment. In *Ramsey* v. *Dunlop,* 205 S.W. 2d 979, the

Supreme Court of Texas held: "Appellate courts may consider fundamental errors though they are not assigned."

3. The assertion of Federal rights when plainly and reasonably made is not to be defeated under the name of local practice. *Davis, Director General of Railroads* v. *Wechsler,* 263 U.S. 22, 24.

It is within the province of the Supreme Court of the United States to inquire not only whether the Federal right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-federal grounds of decision that were without fair or substantial support. *Ward et al* v. *Board of County Com'rs of Love County, Okla.,* 253 U.S. 17, 40 Sup. Ct. 419; *Postal Telegraph Cable Co.* v. *City of Newport, Ky.,* 247 U.S. 464, 38 Sup. Ct. 566.

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, and in the reply brief of petitioner, which may not have been received in time to be submitted to the Court, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Supreme Court of Texas.

ROBERT W. HAINSWORTH
Counsel for Petitioner

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

ROBERT W. HAINSWORTH
Counsel for Petitioner